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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.

COFFEE COUNTY, TENNESSEE, *Petitioner*

v.

CITY OF TULLAHOMA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this cause.

OPINIONS BELOW

The opinion of the District Court is reported in 204 F. Supp. 794 (1962) and is also printed in the record (R. 34).

The majority opinion of the Court of Appeals and the dissenting opinion of Judge Weick (*infra*, Appen-

dix A, pp. 1a-22a) is unreported but appear in the record (R. 99).

JURISDICTION

The judgment of the Court of Appeals was entered May 14, 1964 (*infra,* Appendix B, pp. 23a-24a).

Jurisdiction to issue the writ rests on Title 28, USCA, Section 1254(1) and Title 28 USCA, Section 1651.

QUESTIONS PRESENTED

1. Does the Tennessee Valley Authority Act of 1933, as amended, (16 USCA Sec. 831-L), obligate a city, operating its own power distribution system and purchasing from Tennessee Valley Authority, to pay to the county in which the city operates all or part of the moneys which the city takes from its distribution system and places in its general fund and which are calculated by applying the county tax rate to the value of the electric distribution properties?

2. Whether the respondent city is required by contract with Tennessee Valley Authority executed under the provisions of the Tennessee Valley Authority Act of 1933, as amended, (16 USCA Sec. 831-L), to distribute to the petitioner county such part of the payments in lieu of taxes paid into respondent's general fund by respondent's municipal power distributor, as are calculated by application of the prevailing county tax rate to the value of the system?

3. Is a city who purchases power from the Tennessee Valley Authority by contract executed under provisions of the Tennessee Valley Authority Act of 1933, as amended, (16 USCA, Sec. 831-L), obligated to distribute to a county in which the city operates such part of the payments in lieu of taxes paid into the city gen-

eral fund as are calculated by application of the prevailing county tax rate to the value of the system, without implementation?

STATUTES INVOLVED

The statutes involved are set out in Appendix C, *infra,* p. 25a.

STATEMENT OF THE CASE

The City of Tullahoma, Tennessee, Respondent, (hereinafter sometimes called "The City"), is situated in Coffee County, Tennessee, Petitioner, (hereinafter sometimes called "The County"). The City does now and has for many years owned and operated an electrical distribution system (R. 32). That system is administered and operated under a separate agency of the City known as its "Board of Public Utilities". A statute of the State of Tennessee, to-wit: Tennessee Code Annotated, Section 6-1316, exempts the property and revenues of municipal electric distribution systems from all state, county and municipal taxation. Thus by setting up its municipally owned electrical distribution system the City has never paid to the County taxes or tax equivalents and the City has thereby removed from county taxation certain property which would otherwise be subject to county taxes.

On July 1, 1947, effective January 1, 1949, the City entered into a contract with Tennessee Valley Authority (sometimes hereinafter called T.V.A.), (R. 13), under the terms and provisions of the Tennessee Valley Authority Act of 1933, as amended, (16 USCA Sec. 831-L). Said contract provides for the purchase by the City of its wholesale electric power supply from TVA (R. 13).

The City submitted the actual control of the operation of its municipal electrical distribution system to the TVA under the indirect device of said power purchase contract.

The City immediately began to collect from the revenues of the municipal electric distribution system, as it was authorized by the aforesaid contract to do, certain funds in lieu of all taxes, both municipal and county, upon said system. The sums so collected by the City were calculated by applying prevailing municipal and county property tax rates to the value of the electric system (R. 32). Such practice on the part of the City continued until during the calendar year 1959, when the County made demand for that portion of the fund placed into the general fund of the City under said contract calculated by means of the county tax rate for the year 1959 and in the amount of $27,892.76. The County bases its demand under a provision of the Tennessee Valley Authority Act, as amended in 1940, which provision (now a portion of 16 USCA Sec. 831-L) is as follows:

> "Nothing herein shall be construed to limit the authority of the Corporation in its contracts for the sale of power to municipalities, to permit or provide for the resale of power at rates which may include an amount to cover tax-equivalent payments to the municipality in lieu of State, county, and municipal taxes upon any distribution system or property owned by the municipality, or any agency thereof, conditioned upon a proper distribution by the municipality of any amounts collected by it in lieu of State or county taxes upon any such distribution system or property; it being the intention of Congress that either the municipality or the States in which the municipality is situated shall provide for the proper

distribution to the State and county of any portion of tax equivalent so collected by the municipality in lieu of State or county taxes upon any such distribution system or property.

The Corporation shall, not later than January 1, 1945, submit to the Congress a report on the operation of the provisions of this section, including a statement of the distribution to the various States and counties hereunder; the effect of the operation of the provisions of this section on State and local finances; an appraisal of the benefits of the program of the Corporation to the States and counties receiving payments hereunder, and the effect of such benefits increasing taxable values within such States and counties; and such other data, information, and recommendations as may be pertinent to future legislation."

The City denied the County's right to said funds and on December 22, 1959 filed its suit in the Federal District Court for the Eastern District of the State of Tennessee against the County for a declaratory judgment, requesting the court to construe the statute as not requiring the City to pay to the County any moneys which the City has taken from the municipal electric distribution system and paid into the City's general fund.

The District Court held (1) that under the Tennessee Valley Authority Act of 1933, as amended, the city which operates its own electric distribution system and purchases its electric power from the Tennessee Valley Authority, is obligated to pay to the county certain tax equivalents which are taken from revenues of the City's electric department and placed in its general funds, and (2) that under the Act the Tennessee Valley Authority is required to include in its contra s

with cities provisions implementing such statutory obligation. (R. 34-47)

The United States Court of Appeals for the Sixth Circuit (sometimes hereinafter called the lower court), upon the City's appeal, reversed the District Court (R. 113), one judge dissenting (R. 116).

REASONS FOR GRANTING THE WRIT

I. The decree of the court below is in conflict with a prior decision of the Supreme Court of the State of Tennessee, the court of last resort of that state.

The court below made slight mention of a case determined by the Supreme Court of the State of Tennessee, in which case that court settled that the determinative question was the proper construction of the 1940 amendment to Section 13 of the TVA Act. *Rutherford County* v. *City of Murfreesboro,* 205 Tenn. 362, 326 SW 2d 653, cert. den., 361 US 919.

That court (Supreme Court of Tennessee) after considering a contract between the City of Murfreesboro and TVA, which contract was substantially identical to the contract here, stated that the 1940 amendment to the TVA Act had as its purpose to require:

> "That the municipality must distribute these tax equivalents fairly and as a replacement of lost taxes as among the several governmental units; otherwise the municipality will be allowed to make a profit on the operation by collecting those tax equivalents and retaining all of them for itself." *Rutherford County* v. *Murfreesboro, supra.*

The Supreme Court of Tennessee further held in said case that the congressional intent expressed by the 1940 amendment is:

> "That TVA has a discretion in making such contracts with municipalities either to include a pro-

vision for tax equivalent payments as therein described or to omit any such provision; but if such a provision be included, it must be conditioned upon a proper distribution by the municipality of any such amounts collected in lieu of state or county taxes upon any such distribution system or property." *Rutherford County* v. *Murfreesboro, supra.*

While it is conceded that the decision of the highest court of a state on federal questions are not binding on a federal court, such decisions are entitled to consideration and are persuasive. It is believed that the decision of the Tennessee Supreme Court is more than merely persuasive in this instance in that the Supreme Court of the United States denied certiorari. *Rutherford County* v. *City of Murfreesboro, supra.* Thus, we believe, indicating its approval of the decision.

II. The decision of the court below as to legislative intent is in conflict with clearly expressed congressional intent.

The fourth paragraph of Section 13 of the Tennessee Valley Authority Act as amended in 1940 has been heretofore quoted. The legislative intent is clearly expressed therein as follows:

> " . . . It being the intention of congress that either the municipality or the state in which the municipality is situated shall provide for the proper distribution to the state and county of any portion of tax equivalents so calculated by the municipality in lieu of state or county taxes upon any such distribution system or property." 16 USCA Sec. 831-L.

We believe it to have been unnecessary for the court below to examine the background and legislative history of the 1940 amendment to Section 13 of the TVA

Act of 1933 in view of the express intent of congress contained in the act itself. Legislative intent should thus be determined from the wording of the act, as amended, and the effectuation of legislative intent is a primary concern of any court in construing a statute. *United States* v. *Burleston,* 127 F. Supp. 100.

> "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law making body which passed it, the sole function of the courts is to enforce it according to its terms (cases cited)." *Caminetti* v. *United States,* 242 US 470, 37 S. Ct. 192; 61 L. Ed. 442.
>
> "All will admit that full effect must be given to the intention of Congress as gathered from the words of the statute." *United States* v. *Bitty,* 208 US 393, 28 S. Ct. 396; 52 L. Ed. 543.

Congressional intent is not only evidenced by the clear wording of the act quoted above, but further in that congress recognized that while it could control TVA it could not control those with whom TVA contracted under the provisions of the act. Therefore congress resorted to an indirect method of control and for all intents and purposes saying (in paragraph 4, section 13 of the 1940 amendment) TVA may elect whether or not to

> "permit or provide for the resale of power at rates which may include an amount to cover tax-equivalent payments to the municipality in lieu of state, county and municipal taxes upon any distribution system or property owned by the municipality, or any agency thereof, conditioned upon a proper distribution by the municipality of any amounts

> collected by it in lieu of state or county taxes upon any such distribution system or property . . . ." 16 USCA Sec. 831-L.

clearly indicating that in the event TVA did provide for in lieu tax payments in its contracts with municipalities then there must be a proper distribution to the county of tax equivalents collected by virtue of such contract.

It is contended that the contract having been executed between the City of Tullahoma and TVA, there then arose a duty on the part of TVA to see that proper distribution of such tax equivalents be made. Black on Interpretation of Laws, p. 341.

The court below sought to compare terminology of the TVA act prior to its 1940 amendment with that subsequent to the 1940 amendment. Prior to the 1940 amendment Section 13 provided that TVA should make payments only to the states of Alabama and Tennessee. This situation was sought to be corrected by a proposed amendment to the act before the senate of the 75th Congress. [Amendment to TVA Act proposed by S. 2925 (1940)] (R. 52)

The lower court found that both as to redistribution of payments made by TVA to the states and the municipal in lieu tax payments, Senate Bill No. 2925 in its original form merely expressed a general intent without imposing specific duties with reference to redistribution. Senate Bill No. 2925 originally provided:

> "The payments above provided shall in each case be made to the state not later than July 31 of each year, and it is the intention of the congress that each state shall redistribute said payments or a portion thereof to counties and other local taxing

districts affected by the program of the corporation.

"It is likewise intended that each of the said states shall in like manner redistribute all payments made in lieu of taxation paid to municipalities by municipal authorities as provided in contracts made for the purchase of power from the corporation." [Amendment to TVA Act proposed by S. 2925 (1940)] (R. 52)

It appears that no specific duties were imposed by that proposed amendment with reference to redistribution. The paragraph dealing with redistribution by the states was eliminated and the paragraph dealing with municipal tax equivalent payments was revised as follows:

"It is intended by congress that each of the said states shall distribute all payments made in lieu of taxation paid to municipalities by municipal authorities as provided in contracts made for the purchase of power from the corporation." 86th Cong. Rec. 5248 (1940).

As pointed out by the lower court, the crucial language of Section 13 involved in this litigation was substituted by an amendment offered from the floor of the senate by Senator Hill of Alabama.

There is some indication on the part of the lower court that upon the amendment being made from the Senate floor on April 30, 1940, which resulted in the final language of the amended act, the matter was dealt with lightly, the court having in its opinion quoted the only discussion which occurred on the Senate floor, as follows:

"Mr. Hill: I understand that this amendment also is agreeable to the senator from Nebraska.

"Mr. Norris: Yes, I see no objection to it, and in fact I think it is a very good amendment." 86th Cong. Rec. 5247 (1940)

It is worthy of note, however, that as early as April 3, 1940 Mr. William C. Fitts, Jr., General Counsel for TVA, had been furnished the proposed amendment to S. 2925 by Mr. Lilienthal, a member of the Board of Directors for TVA, and which contained the exact wording of the final amendment. On April 3, 1940 Mr. Fitts forwarded the following letter:

"April 3, 1940

The Honorable
George W. Norris
United States Senate
Washington, D. C.

My dear Senator Norris

Mr. Lilienthal has handed to me a copy of the amendments to S. 2925 as reported by the Committee on Agriculture and Forestry which have been suggested by Mr. Lapsley through Senator Bankhead. Mr. Lilienthal suggested that I send you whatever comments I might have on these proposed amendments.

I have considered each of the amendments and while I do not believe that any of them are necessary, I see no serious objection. As far as I can see they in no way alter the substance of the bill as reported.

Sincerely and respectfully yours

WILLIAM C. FITTS, JR.
General Counsel

WCF:LR"

It is thus clear that the proposed amendment offered from the floor of the Senate was by no means merely a passing thought but was the perfecting amendment which solved the problem involved, that is, to replace lost taxes to the counties.

It is submitted that the final perfecting amendment cured the problem described by Mr. John D. Lapsley, who was counsel for the State Department of Revenue of Alabama and who was also a representative of the Governor of Alabama and Senator Norris, when Mr. Lapsley appeared to testify before Senator Norris' sub-committee on February 23, 1940. The exchange which occurred between Mr. Lapsley and Senator Norris was as follows:

> "Mr. Lapsley: That is my point, Mr. Chairman. And an additional point on that is that if there are cities in these counties which are collecting a county and state ad valorem tax loss equivalent, that the amount being collected by the city for that purpose in that county should be taken into consideration, and the city should turn over to the state the state and county tax money, or if it pays it to the county, those payments from the city to the county should be deducted from the payments made directly from the TVA to the county. In other words, you have got quite a problem there.
>
> Senator Norris: I know we have. But one of the difficulties that exists right now, as I understand it, and that I think is entirely due to the lack of any state law in any state there, as far as I know—I thought when the original act was passed that the several states would pass laws that would rectify it—for instance, if they paid into a city, City A, let us say, $100,000.00 in lieu of taxes, it was the intention of congress, I take it when it passed the law, or it was the intention of TVA when it made the contract to sell the power

to that municipality, A, that it should be realized in lieu of taxes, and therefore it should be divided up when it was paid for by the city, just as though they would have divided it up if it had been privately owned. Some of it would have gone to the state, some to a school district and some to other subdivisions. But, as I understand it, the city never passed any law requiring that division, and the municipality, naturally, keeps it all.

Mr. Lapsley: Yes, sir.

Senator Norris: And the county does not get any of it.

Mr. Lapsley: Nor the state either.

Senator Norris: Nor the state either. Now, that is one of the difficulties we wanted to rectify and have put in this bill. While we cannot legislate on that, being a state matter, we have gone so far as to state in here that it is the intention of congress, which we did not state originally—it is the intention of congress to do this very thing.

Mr. Lapsley: Well, Mr. Chairman, you state that it is the intention of congress that the state shall do what I had in mind, but you do not express the intention of congress that the cities with whom TVA contracts shall do the same thing.

Senator Norris: Oh, yes; the states could provide by statute that when any municipality receives anything in lieu of taxation, it should be subdivided just the same as though it was taxes—which we cannot say . . . ."

Hearing on S. 2925 before a sub-committee of the Senate Committee on Agriculture and Forestry, 76th Cong., 3rd Sess. 33 (1940)

It is further noted that in the sub-committee hearing of the Senate Committee on Agriculture and Forestry, Senator Norris was led to believe that the municipali-

ties in Tennessee were paying or planned to pay over tax equivalents to the counties in which they were located.

> "Mr. Lapsley: Now, Mr. Chairman, I thought it would be interesting to the committee to know this, because the problem is so different in Alabama than it is in Tennessee, and that is that the money collected by the cities in Alabama is not only not paid to the counties and the State, but the cities have organized to oppose the passage of any such legislation, and whereas in Tennessee certain cities, I understand, have put the money in trust in the bank and are waiting for the passage of enabling legislation and are offering to pay the money to the counties and the State, the Alabama cities make no such proposal and we look on it that as a practical proposition it would be very difficult, if not impossible, to pass any legislation to force the cities to turn any portion of the tax equivalent that they collect over to the States or the counties.
>
> Senator Norris: Now, that is where the controversy arises, and where I cannot help but sympathize somewhat with these people who are advocating that this money should be paid to the counties.
>
> Mr. Lapsley: I do too.
>
> Senator Norris: I would hate to see the State get into a jangle and a fight over the question and hold it up and not pass any law. That would not relieve the situation if that occurred."
>
> Hearing on S. 2925 before the subcommittee of the Senate Committee on Agriculture and Forestry, 76th Cong., 3rd Sess. 34 (1940)

Thus we see that Senator Norris recognized the possibility of a "jangle and a fight" over the question and

for this reason, among others, it is contended that even though some doubt may conceivably have arisen from earlier sections of the act, yet all doubt was removed by the enactment of Paragraph 4, Section 13 of the Act in 1940. It is submitted that doubt arising from language of two provisions of the same statute as to meaning thereof will be resolved in favor of the latter expression. *Skeeles* v. *United States,* 95 F. Supp. 242.

It is further submitted that from the Senate subcommittee hearing on S. 2925 [Hearing on S. 2925 before a sub-committee of the Senate Committee on Agriculture and Forestry, 76th Cong., 3rd Sess. 33, 34 (1940)], Senator Norris recognized the possibility of enabling statutes being passed by one or more of the various states, which enabling statutes possibly would conflict with the intent of Congress, the Tennessee Valley Authority Act and the resulting power contracts entered into between TVA and various municipalities, thus creating greater confusion than had previously existed. This was simply another reason for providing in specific language the clear intent of Congress, i.e., the amended Section 13.

This is further evidenced by the following exchanges which occurred on February 23, 1940 before the above mentioned Senate sub-committee:

From exchange between William C. Fitts, Jr., General Counsel for TVA, and Senator Norris:

> "Mr. Fitts: Yes. Now, you see what is happening is that those retailers who purchase their power at wholesale from the Authority and then retail it to the consumer, those retailers are already collecting the taxes just like the private utilities always collected the taxes from the rates paid. The only problem is for the State to get

back from the retailer its share of those taxes that the retailer is already collecting, and also to distribute to the counties their proportionate share. What is happening in some of the cases where the legislation is not adequate is that the cities are taking it all; the municipal governments are taking that entire tax equivalent payment for themselves, when most of it should be redistributed to the State and the county."

[Hearing on S. 2925 before a Senate sub-committee of the Senate Committee on Agriculture and Forestry, 76th Cong., 3rd Sess. 9 (1940)]

From exchange between Mr. W. D. Hudson, member of the Railroad and Public Utilities Commission of Tennessee and Senator Bankhead from Alabama:

"Mr. Hudson: That is what we want. Of course, Tennessee cannot tax a municipality. The constitution of the State of Tennessee prohibits that. But we can set up a power board with uniform duties of power boards all over the State to carry out these contracts with the Tennessee Valley Authority, which will mean they will have to pay these taxes where they belong. That problem can be solved and will be solved by the State of Tennessee.

What we want primarily is replacement of taxes lost by these counties. I want to just read you a few losses by some of these counties. Take Polk County, a county of approximately 15,000 population, with a bonded indebtedness of a million and a half dollars. That county will lose, as a result of the purchase of the two dams on the Tacoa River—I will give you just exactly what they will lose—that county will lose $106,137.68. If they do not get replacement, they will have to quit.

Senator Bankhead: They cannot quit, can they? A county cannot quit.

Mr. Hudson: They cannot pay off. They have built their budget around this assessment. They have built their bond issue around this assessment. I will admit it is bad for any one county to build its whole budget assessment around one uncertain piece of property for taxation, but there is no way you can help that. That is water over the dam. That has been done. Now, their schools cannot operate. They cannot build their roads and keep them in repair. They will have to quit, and the people who bought these bonds will have to suffer the loss.

Take Marion County, where they bought Hales Bar. I do not think Marion County has an incorporated town in the county. It is a small country county. Marion County will lose $82,137.92. They will have to quit. They cannot exist unless they get a tax replacement to take the place of the taxes they got from the Tennessee Electric Power Co.

Then there is Warren County, White County, Van Buren County. White County is a small county. That is where they bought the Rock Island Dam on Kings Fork River, a tributary to the Cumberland River. They will lose $34,714.91.

[Hearing on S 2925 before a Senate sub-committee of the Senate Committee on Agriculture and Forestry, 76th Cong., 3rd Sess. 24 (1940)]

And a statement of Senator Norris on April 30, 1940 before the United States Senate as follows:

"Mr. Norris: . . . The original bill, without the amendments, provided, as the Senator has stated, that the money which is proposed to be paid in lieu of taxes to any given State should be paid by the T.V.A. to the State itself, and that the State should divide it up as it pleased. It was believed that the State would divide it up the same manner as it would if it were actually tax money. We

must always bear in mind that the money in question is not tax money, because we have to go through the formula at least of refusing to admit that local authorities can tax the property of the Federal Government. I think that is agreed to by everybody.

The several counties in the various States involved have asked for the amendments because the original act provided in section 3 for payments of money in lieu of taxes to two States, Alabama and Tennessee. I think it was the intention of Congress, without any doubt, that when the money was paid to the States—and it has been so paid ever since the T.V.A. Act has been enforced—the States would do just what the Senator from Connecticut has suggested; that by proper legislation they would divide the money up among the counties. But experience has shown that the States did not do it, and therefore various persons and organizations, coming from the counties, and representing the interests of the counties, have appeared before the committee, and have shown what we knew to be true, that the counties heretofore have gotten nothing from the States of Alabama and Tennessee because those States did not, through their legislatures, provide for the division of this money among the counties in which the property was located. The result was that the States got the money, and the counties suffered the loss . . .

That the States should divide up this money was undoubtedly the object of Congress originally, and it is the object in the pending legislation. In fact, it is so stated in the bill, but it can only be stated as the intention of Congress, for it is admitted that Congress cannot say to the States what legislation they shall pass. If Congress expressed, as the original bill provided, its intention that the States should divide up this money, the States would not be legally bound to pay any attention to it. And since they have not done it in the past,

the taxpayers' leagues, and the county organizations, and the State organizations, and county judges, called the attention of the committee to the fact that the States have not done what it was intended they should do, and that the purchase of the properties of the Tennessee Electric Power Co. has resulted in adding to the embarrassment, if I may call it that, heretofore existing in regard to the money the Tennessee Valley Authority should pay in lieu of taxes, by virtue of original section 13, and they said, "Our experience shows that the people who ought to get the money paid in lieu of taxes will not, under this bill, get it."

I am in entire sympathy with their position. I think the States ought to pay the money as suggested. The original bill provided that they should. But when I am confronted with the fact that the States may not do so, and that in the past they have not done so, then I am moved by a desire to assist those counties by the adoption of appropriate amendments. Some of the counties are hard hit under present conditions, and some of them will be in such a dilemma as to make it almost impossible for them to meet their indebtedness, indeed, to meet their ordinary running expenses. That will only occur in very few counties, but it will occur in some.

In order to obviate this difficulty I have favored, as the committee has favored, the proposed amendments, so as to provide that the T.V.A., instead of paying the States, shall pay the counties or the units of the States where taxes are as a rule paid, unless there is some State law to the contrary."

86 Cong. Rec. 5243-5244 (1940)

It is further insisted the language used in the perfecting amendment resulting in the crucial language of Section 13 involved in this litigation, was specific

and that any general language contained therein or creating any inconsistency must be resolved in favor of the specific. *Bradford Novelty Co.* v. *Manheim,* 156 F. Supp. 489.

A similar finding as to congressional intent generally was reached by the District Court in *Tennessee Valley Authority* v. *Polk County,* D. C. Tenn., 68 F. Supp. 692, wherein the court stated:

> "From the provisions of Section 13 itself, from a study of the committee hearings, and a consideration of the remedies sought to be effected by the legislation, I am convinced that, insofar as the counties are concerned, Congress intended to replace to each county taxes lost on the property acquired by the plaintiff in such county. I think a proper construction of Section 13 relative to the rights of the counties will effectuate such intention."

Even assuming the necessity of inquiry by the lower court into the question of background and legislative history, we believe the same result will be reached by this Court and should have been reached by the lower court.

The record does in fact show that TVA prior to the 1940 amendment of Section 13 of the TVA Act had included in its contracts with municipalities provisions for in lieu tax payments and such contracts were basically the same as the contract in the present case. The authority for such contracts prior to 1940 was derived from Section 10 of the Act, as amended in 1935. Under the terms of those contracts tax equivalents were placed into the general funds of the contracting municipality and, as pointed out by the opinion of the lower court, the determination of whether

any portion of the fund should be distributed either to the state or to the county, and if so, the amount, was not recognized as a duty or obligation of TVA, a situation completely different from that existing under the 1940 amendment.

As heretofore expressed, we believe that it is unnecessary to examine the background and legislative history of the statute in question and further in view of of the plain congressional intent expressed in the statute, it may be improper to do so. *United States* v. *Burleston, supra; Caminetti* v. *United States, supra; United States* v. *Bitty, supra.* However, to point out that the fact that the congressional intent is found to be the same, by either route, we have inquired into the intent both as expressed in the statute and as determined by examination of sub-committee hearings and congressional records of Senate proceedings.

It is submitted that the background of the act in question, as determined by reference to the committee hearings, clearly points out the congressional recognition of the problem, the effort to correct the problem and the ultimate correction of the problem by the enactment of the particular statute in question.

III. The lower court placed undue emphasis on administrative interpretation and congressional acquiescence.

It is submitted that the record in this cause at no place presents an interpretation placed by the T.V.A. Board of Directors on the Tennessee Valley Authority Act. The record, in fact, indicates that little more doubt existed in the mind of that Board.

The Court in *Rutherford County* v. *The City of Murfreesboro* stated:

> "In behalf of the City (Murfreesboro) it is further argued that Condition 2(b) of the schedule

quoted supra, is an interpretation by the TVA officials in making this contract with the City of Murfreesboro that is contrary to what we have hereinbefore stated. If so, we think theirs is erroneous. We rather believe, however, that it is a recognition of the responsibility of the municipality to make the distribution as required by the amendment and that the words immediately following the opening words of the sentence are generalizations brought about by some uncertainty in the minds of the officials as to the meaning of the part of the 1940 amendment following the semicolon." *Rutherford County* v. *City of Murfreesboro, supra.*

Congress by its 1940 amendment (16 USCA 831-L) required TVA to submit a "report on the operation of the provisions of this section . . . " (i.e., 16 USCA 831-L), not later than January 1, 1945. Such a report was in fact submitted to Congress by TVA's letter of December 22, 1944. With reference to "Tax and in-lieu payments by local distribution systems", the report stated:

"The power contracts and agreements, through which the TVA exercises its responsibilities for the distribution of electric power, make provision for payments by municipal systems in lieu of state and local property taxes. These in-lieu payments are usually computed by applying the current property tax rates of each jurisdiction to the book value of the electric property within such jurisdictions.

"In the absence of state legislation or special local agreements to the contrary the entire state and local ad valorem property tax equivalent of each system is paid into the general fund of the owning municipality."

The report of TVA further states:

> "Tax as paid by the cooperatives go to the states, counties, and cities in which the property is located. On the other hand, the equivalent of the former state and county taxes on municipally owned systems is commonly paid into the general funds of the municipalities owning the systems, and used for various municipal purposes."

It will be expressly noted that TVA's report does not state to which power contracts and agreements it refers, that is, whether before or after the 1940 amendment to the TVA Act. The report does not state that any "in-lieu" tax payments are or have been calculated by application of county tax rates. The report of TVA does not state to which state or states it has reference. TVA in its report made no recommendation and expressed no approval of the situation it purported to report. Therefore, in view of the vague generalities contained in and surrounding TVA's report, there was absolutely nothing in which Congress could acquiesce.

This accompanied with the fact that the obvious purpose of an Act of Congress (which was so clearly expressed in 16 USCA 831-L) will be sustained by the courts, notwithstanding a contrary construction of an executive department—*Webster* v. *Luther,* 63 U.S. 331, 16 S. Ct. 963, 41 L. Ed. 179; *Alaska S. S. Co.* v. *United States,* 290 U.S. 256, 54 S. Ct. 159, 78 L. Ed. 302; *Stark* v. *Bronson*, 342 U.S. 451, 72 S. Ct. 433, 96 L. Ed.— clearly reveals why Congress did not and could not have acquiesced in a TVA administrative interpretation which never existed. The acquiescence of Congress could hardly be inferred from the mere fact that it had passed no additional legislation to clarify the already clarified TVA Act.

IV. The determination of the lower court violates grammatical interpretation of the statute involved.

Turning to the actual language used in effectuating its declared intent, it is found that Congress permitted the sale of electric power at rates high enough to permit payment of tax equivalents to municipalities by specific sanction. However, this permission or authority was defined and limited in positive terms. It will be observed that in the troublesome statute involved, 16 USCA 831-L, the phraseology is:

> "to permit or provide for the resale of power at rates which *may* include an amount to cover tax equivalent payments to the municipality in lieu of . . . *county* . . . *taxes* upon any distribution system or property owned by the municipality or agency thereof, *conditioned upon a proper distribution by the municipality of any amounts collected by it in lieu of . . . county taxes upon any such distribution system or property.*"

It is evident that the phrase beginning "conditioned upon a proper distribution by the municipality . . . " relates to and qualifies that which precedes; and since it is set off from that which precedes it by a comma it is equally evident that it qualifies the entire preceding portion of the same sentence rather than a single noun or pronoun in the sentence. The very word "conditioned" denotes a restriction of the authority granted TVA by Congress to certain prescribed limits. The prescribing of limitations on the authority of TVA to make certain types of contracts is well within the province of legislative prerogative, and therefore if certain types of contracts are entered into by TVA, i.e., including provisions for collection of tax equivalents, they must be entered into subject to the conditions imposed by Congress, i.e., "conditioned upon a proper

distribution by the municipality of any amounts collected by it in lieu of . . . county taxes upon any such distribution system or property."

V. The court below has decided an important question of federal law which has not been, but should be, settled by this Court.

For the year 1959 the Utilities Board for the City of Tullahoma paid into the general fund of the City an aggregate sum of $27,892.76 under Section 10(c)(2) of the contract between the City and TVA. Said section of the contract contains provisions for application of the county tax rate on the value of the power system. The County in the year 1959 made demand of the City for said sum.

The entitlement of said funds here in question depends on the construction of the contract between the City and TVA, which contract in turn derives its efficacy from the Tennessee Valley Authority Act, as amended, 16 USCA Chap. 12-A, and the contract is circumscribed by all the pertinent provisions of said statute. *Armour Packing Co.* v. *United States,* 209 U.S. 56, 28 S. Ct. 428, 52 L. Ed. 491.

The statute here in question relates to the subject matter of the contract between the city and TVA and must, it is submitted, be read into said contract, there being no contrary intent appearing. *Armour Packing Co.* v. *United States, supra; Connecticut Mutual Life Ins. Co.* v. *Creshman,* 108 U.S. 51, 2 S. Ct. 236, 27 L. Ed. 648.

The court's attention is here called to the far reaching effect of its decision in the event it shall fail to consider this cause on writ of certiorari. TVA has entered into contracts similar to that in this cause with

some 98 cities other than the City of Tullahoma and located in the states of Tennessee, Kentucky, Alabama, Mississippi, North Carolina and Virginia. It is believed that to deny certiorari in this cause would be to create a great multiplicity of actions in both the state and federal courts of the above named states, especially in view of the above mentioned contrary decision of the court of highest resort in Tennessee--*Rutherford County* v. *Murfreesboro, supra.*

The decision of this court on writ of certiorari will finally and completely settle and determine the controversy which has been created by the contract for the purchase of wholesale electrical power between various municipalities and the TVA.

CONCLUSION

There are gross inequities in the decision of the lower court. That decision permits a municipality contracting with TVA under the provisions of 16 USCA 831-L to include in its rates, which it charges to users of electricity, sums in lieu of county taxes when in reality they are for no such purpose but are used by the municipality for its own purposes. Such constitutes a gross misapplication of the formula prescribed by Congress and set down in 16 USCA 831-L as well as to do violence to the basic purpose for the enactment of that statute.

It is submitted that upon execution of the contract between the City and TVA which contained provisions for collection of in-lieu tax equivalents, the City in no uncertain terms guaranteed that it would make proper distribution of those funds to the county, and the TVA by so doing was obligated to determine that such distribution would be made by the City to the County.

It is our contention that the rights of the county are clear under the statute involved and the executed contract. That the court has no power to make a new contract between TVA and the City. *American Fidel. & Cas. Co.* v. *St. Paul Mercury Indemnity Co.*, 248 F. (2d) 509. But that the court can and will read into the contract involved what the law had previously put there. This court should grant the writ of certiorari and clear the confusion which does now exist and which will otherwise continue to exist.

Respectfully submitted.

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